FILED
JUL 10 1941
CHARLES ELMORE CROPLEY
CLERK

(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY

vs.

PIERRE MISTROT.

REPLY BRIEF OF PIERRE MISTROT IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

WADE O. MARTIN, JR.,
L. AUSTIN FONTENOT,
Counsel for Respondent.

INDEX.

Subject Index.

	Page
Statement	1
Points raised in plaintiff's brief	4
I. The consignor is primarily liable for the freight charges	4
II. The bills of lading are the sole evidence of the agreement of the parties	10
III. Do cases cited by the Court of Appeals of Louisiana fail to support its decision?	14

Table of Cases Cited.

Chicago and E. I. R. Co. v. *Collins Produce Co.*, 249 U. S. 186, 39 Sup. Ct. 189	10
Fullerton Lumber Co. v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 520, 51 Sup. Ct. 227	7, 8, 11
L. & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59	6, 11
Southwestern Bell Telephone Co. v. *State of Oklahoma*, 303 U. S. 206	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 116

THE PENNSYLVANIA RAILROAD COMPANY

vs.

PIERRE MISTROT.

BRIEF IN OPPOSITION TO APPLICATION OF PLAINTIFF FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

Plaintiff alleges that this case raises a question of Federal Law governing the proper application and interpretation of the uniform bill of lading approved by the Interstate Commerce Commission, and which, plaintiff says, the Court of Louisiana have misconceived and misapplied.

We submit that a reading of the record will show that these allegations made by the plaintiff in its petition are fictitious, and if in good faith, are made on a misconception and misapplication of the facts and issues submitted to the Courts of Louisiana.

The Writ herein prayed for should be refused for the reason that the facts of the case, as shown by the record, entirely fails to disclose or involve an action or controversy properly within the jurisdiction of this Court.

The issue of facts presented to the Courts of Louisiana, and upon which the State Court passed, boiled down, means

nothing more nor less than this: Can the plaintiff, in a suit filed on October 24, 1936, and without previous notice to the defendant as to the true nature of its demand, recover of the defendant the aggregate amount of two checks dated May 10th and May 11th, 1934, and alleged to have been received by plaintiff from Tom Ayoob Company, who was neither consignor nor consignee, in payment of freight charges on shipment covered by the bills of lading and to whom plaintiff delivered the freight on two orders reading as follows:

"DELIVERY ORDER.

April 30, 1934.

Freight Agent, Pennsylvania Lines, Pittsburg, Pennsylvania.

DEAR SIR:

(fol. 3) On surrender of this letter and PAYMENT OF FREIGHT CHARGES, please deliver to Tom Ayoob Company, or bearer, Car PFE-28010, cabbage shipped from Arnaudville, Louisiana by P. Mistrot and billed to P. G. Sackenreuther advise Tom Ayoob Company on arrival.

Yours truly,

(Signed) P. G. SACKENREUTHER."

PGS:LP.

"DELIVERY ORDER.

April 30, 1934.

Freight Agent, Pennsylvania Lines, Pittsburg, Pennsylvania.

DEAR SIR:

On surrender of this letter and PAYMENT OF FREIGHT CHARGES, please deliver to Tom Ayoob Company, or bearer, car PFE-27141, cabbage shipped from Arnaudville, Louisiana, by P. Mistrot and consigned to P. G. Sackenreuther, advise Tom Ayoob Company on arrival.

Yours truly,

(Signed) P. G. SACKENREUTHER."

See Printed Transcript of Record Pages 2 and 3.

The Twenty-Seventh Judicial District Court, St. Landry Parish, La., held under the facts presented to it that the defendant was not liable to the plaintiff because *he* had been relieved of liability by acts and omissions of the Railroad Company. See printed Transcript of Record, Page 35.

The Louisiana Court of Appeals, First Circuit, all Judges concurring, affirmed the ruling of the lower court for, among other reasons, because the plaintiff had failed to show that it had exhausted all means of collecting the checks from the Tom Ayoob Company. See printed Transcript of Record, Page 44.

The Louisiana Supreme Court, with all facts before it, refused the Plaintiff a Writ of Certiorari in these words: "Writ refused—judgment correct."

When we call the attention of this Court to the fact that the first demand made on the defendant was dated August 13, 1935, one year, three months and three days after the date of the checks alleged to have been given by Tom Ayoob Company in payment of the freight, and the further fact that the letter from the Assistant General Solicitor making the demand and shown in the printed Transcript of Record at Pages 22 and 23, did not even advise defendant that a claim was being made against him because of the alleged non-payments of checks given in payment of freight and that it was only in plaintiff's petition filed two years, five months and fourteen days after date of checks that he had notice that the checks given in payment of freight had not been paid by the unnamed Bank upon whom they were supposed to be drawn, and that the defendant does not yet know, nor do the pleadings or evidence show, who signed the alleged checks, their date, upon what Bank or Banks they were drawn, and for what reason the Bank refused to pay them, that any argument should be necessary to establish that the decisions of the Louisiana Courts in

this case rests on an adequate non-Federal ground and that this Court is without jurisdiction.

Our further argument is to unravel and make clear what we consider to be a misconception and misapplication of the facts by the plaintiff in its petition and brief filed in this case.

We, therefore, take up the points raised in plaintiff's brief in the same order in which the argument is made for the plaintiff.

I.

The consignor is primarily liable for the freight charges.

No one contended in the State Courts that the consignor was not primarily responsible for the freight charges. Nor does either of the State Courts, in their decisions in this case, hold otherwise.

There was raised in the State Court the question as to whether or not the defendant, Pierre Mistrot, was in truth and in fact the consignor or shipper, or whether P. G. Sackenreuther, the owner of the cabbage shipped was the consignor.

The plaintiff alleged in its petition that the defendant was the shipper, but the defendant, in his answer, denied these allegations and in his answer, verified by oath, alleged the true facts to be that he had no interest in the transaction, and that with the full knowledge of the Railroad Company, that he was shipping the cabbage on instructions from P. G. Sackenreuther, Produce Merchant of Houston, Texas, the owner of the cabbage, and that the bill of lading was signed by the defendant because the Railroad Agent, to whom he had explained all of the facts, presented him, for his signature, the bill of lading; or, in other words, the Railroad Agent knew that the cabbage belonged to Sackenreuther and not to the defendant.

A reference to the printed record will show that the defendant verified in person, under oath, the allegations of his answer and that the plaintiff's petition is verified by one of its attorneys "to the best of his knowledge, information and belief". See printed Transcript Pages Four and Fifteen.

We wish to further call the attention of the Court to the fact that the plaintiff offered no evidence at all on the trial of its case, and contented itself with the statement that, "plaintiff rests its case upon the pleadings".

It is true that one of the attorneys of the plaintiff was placed on the witness stand, but he was called, not by the plaintiff, but by the defense.

It will be seen that even plaintiff's attorney did not have with him the two checks alleged upon in Paragraph VIII of plaintiff's petition, and that he did not know anything about Tom Ayoob Company, from whom the checks had been received. See printed Transcript, Page 16.

On the other hand, the defendant took the stand and under oath made good the averments of his answer. See printed Transcript, Pages 18, 19, 20, 21 and 22.

He who alleges a fact must prove it. The plaintiff alleged that the defendant was the shipper of the freight. See printed Transcript of Record, Page 1.

The defendant denied the allegations of the plaintiff. See printed Transcript of Record Page 11.

The plaintiff, in submitting its case "on the pleadings", did not measure up to the rule of proving its allegations and was left entirely dependent on evidence offered by the defendant. This is true both as to whom was "shipper" and whether the freight was paid on dishonored checks.

On the facts the plaintiff failed to make out its case.

The brief of the plaintiff, in seeking to convince the Court, quotes from the *L. & N. R. Co.* v. *Central Iron and Coal Company,* the following language:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

If this statement be correct, and we believe it is, then and in that event the plaintiff is met face to face with the orders of April 30, 1934, authorizing the Railroad Company to deliver the cabbage, on payment of freight charges, to Tom Ayoob Company.

There is no doubt that this written order was the basis of the delivery and the acceptance of checks in payment of freight, if the checks were ever actually received by the plaintiff. At all events, the plaintiff did act on the written order to turn over the cabbage to Tom Ayoob Company on payment of freight charges.

The plea made to this Court is that jurisdiction is vested with the court to review the judgment rendered by the Louisiana courts because forsooth the Louisiana courts misconstrued the application and interpretation of the provisions of the uniform bill of lading approved by the Interstate Commerce Commission and yet plaintiff, in its brief, entirely overlooked the rulings of the Interstate Commerce Commission establishing rules and regulations for the payment of freight charges.

We respectfully call this Court's attention to the fact that the Interstate Commerce Commission's order in proceeding entitled, "Regulations for the Payment of Charges", 171 I. C. C. 268, provides:

> "Checks, drafts or money orders, WHICH ARE SATISFACTORY TO THE CARRIER, in payment of freight charges within the credit periods allowed such shipper, may be deemed to be the collection of tariff

charges within the credit period for the purposes of these rules."

We further quote from the Regulations of the Commission in the aforesaid order, which seems to have been overlooked by the plaintiff, or at least, in its brief; viz.:

> "Every carrier shall present freight bills for all transportation charges except those herein specifically excepted to shippers prior to the first 12 o'clock midnight following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at the delivery point, the freight bills shall be presented not later than the first 12 o'clock midnight following the day upon which sufficient information becomes available to the delivering agent of the carrier."

This quotation from the regulations of the Interstate Commerce Commission and the Commission's Conference Ruling No. 207 requiring freight charges to be paid in money ought to be sufficient to convince any court that the plaintiff was guilty of acts and omissions sufficient to relieve the defendant from liability for non-payment of checks received by the plaintiff two years, five months and fourteen days before giving notice to defendant that checks received had not been paid, or for awaiting one year, three months and three days after said checks had been given to make any claim whatsoever on defendant for payment of freight charges.

Plaintiff, in its brief, quotes from cases having no bearing on the issues involved and contends that the cases cited by the courts of Louisiana in their turn have no bearing on the issues involved.

With the view of clearing up the matter, let us take the case of *Fullerton Lumber Company* v. *Chicago, M., St. P. & P. R. Co.*, decided February 24, 1931, by this Court, Justice Brandeis delivering the opinion for the Court, without any dissent from any of the other Judges.

In that case the Railroad Company was seeking to recover from the Fullerton Lumber Company on a check given to the Railroad Company by the Fullerton Lumber Company in payment of freight charges on a carload of coal shipped to it.

The facts were that the carrier had, as customary, accepted the defendant's check on a local Bank for the amount of the charges; that it had delayed presenting the check for payment, and that meanwhile the Bank had failed. The defendant contended that it was relieved from liability because of the carrier's delay in presenting the check. The trial court ruled that the Interstate Commerce Act required that a carrier's charges be paid strictly in currency; and that since the check had not been paid, the defendant was liable even if the carrier's failure to receive the money was due wholly to its own negligence.

The judgment entered for the carrier was affirmed by the Circuit Court of Appeals, but this Court—the United States Supreme Court—granted a writ of certiorari, 281 U. S. 709, 50 S. Ct. 249, 74 L., and on trial of the writ, this Court held that the provisions of the Interstate Commerce Commission were intended to prevent discrimination and rebates and to insure observance of the tariff rates and that there was no reason for denying to the parties the convenience and safety incident to making payment by means of a check payable on demand, drawn on a going Bank, etc. This Court, in that case, in reversing both the District Court and the Circuit Court of Appeals, declared:

> "Whether, in the case at Bar, the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of Law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us."

Judgment reversed. See *Fullerton Lumber Company* v. *Chicago M., St. P. & P. R. Co.*, 282 U. S. 520, 51 Sup. Ct. 227.

It will be seen that this Court, in that case, even would not make the giver of the unpaid check responsible because of the fault and laches of the Railroad Company. If the Fullerton Lumber Company, who received the freight as owners, were not made to pay the freight bill for the coal they owned and received because the Railroad Company neglected timely to present the check to the Bank for payment, then let us see how it would affect this defendant by comparison with the *Fullerton* case.

In the instant case the defendant was not the owner, nor had he any interest in the cabbage that was shipped, nor did he give any dishonored check.

That the defendant was not the owner of the cabbage that was shipped seems to be admitted even in plaintiff's petition, as we find in the petition, at page 3, as the question presented to the Court is one "involving rights and duties of the consignor and common carrier of interstate shipments of goods under contracts of shipment which require the RESPONDENT (CONSIGNOR) ALTHOUGH KNOWN NOT TO BE THE OWNER OF THE GOODS TO PAY THE LAWFUL ESTABLISHED CHARGES FOR TRANSPORTATION".

As heretofore stated, the plaintiff having alleged defendant to be the shipper, and the defendant having in his answer denied this allegation, it was incumbent upon the plaintiff to prove the disputed fact.

This we say plaintiff failed to do in submitting its case "on the pleadings".

The plaintiff would have defendant pay because the Railroad Company had him sign the bill of lading knowing that he was not the owner nor the shipper.

If the contention of plaintiff be correct, then we have to overcome the statement of the trial Judge that it would be unjust and unconscionable to hold the defendant was not discharged from liability under the facts of the instant case.

II.

The bills of lading are the sole evidence of the agreement of the parties.

We agree that bills of lading are written contracts and that their terms cannot be altered or varied by parole evidence, save and except where fraud or error induced by the agents of the plaintiff or by agreement in writing. We respectfully contend that the evidence offered at the trial shows that the agent of the Railroad Company that issued the bill of lading knew that the defendant herein was not the owner of the cabbage or real consignor thereof and that he was acting solely and only for the consignee. See printed Transcript of Record, Page 18.

As to whether the District Judge was correct in admitting oral evidence under the pleadings boots no argument for the plaintiff, when the order on which the cabbage was delivered to Tom Ayoob with the understanding that the freight was to be paid before taking the freight was in writing and even according to plaintiff's brief at page 7, the charges for freight are matters carrier and shipper are left free to contract subject to the rule which prohibits discrimination.

The Golden Rule for carriers is set forth by Justice Clarke in the case of the *Chicago and E. I. R. Co.* v. *Collins Produce Company,* 249 U. S. 186, 39 Sup. Ct. Rep. 189, as follows:

> "The relation of carrier to shipper so partakes of a fiduciary capacity as to require the utmost fairness on its part in dealing with the shipper and in the discharge of its duties to him; and the reason for this trust and confidence which must be sustained is based upon commercial necessity and public policy. Chicago & E. I. R. Co. *v.* Collins Produce Co., 249 U. S. 186, 39 Sup. Ct. Rep. 189."

Does the plaintiff meet these requirements under the evidence of this case as shown by the record? Can it be said

that the plaintiff could accept the checks of Tom Ayoob Company on the order permitting the delivery to Tom Ayoob Company only on payment of the freight and then two years or more thereafterwards attempt to collect the freight from the defendant without even showing that it made an honest effort to collect from Tom Ayoob Company on the unpaid checks?

Certainly, no one could contend that the Railroad Company could collect both from the consignor and consignee. Having collected from a party who was authorized by the consignee to accept the freight on the payment of the charges, even a consignor would be relieved from all liability by any fair construction of the bill of lading issued and forming a part of the record in this case.

It must be borne in mind that the bill of lading was never taken up by the Railroad Company, but that a delivery of the freight was made exclusively and only on an order of Sackenreuther authorizing the delivery of the freight to Tom Ayoob Company or bearer on payment of the freight charges.

The plaintiff, in its brief, endeavors to make it appear that it is entitled to collect from this defendant regardless of the fact that the freight charges were paid by Tom Ayoob Company by check.

They say in their brief, "nor could any act of omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

They quote for authority the case of *L. & N. R. Co.* v. *Central Iron & Coal Company*, 265 U. S. 59, 67, but they entirely overlooked the later case of *Fullerton Lumber Company* v. *Chicago M. St. P. & P. R. Co.*, reported in 282 U. S. 520, 51 Sup. Ct. 227, in which this Court says:

> "Carrier accepting check for freight charges held not relieved from loss resulting from delay in present-

> ing check, by general requirement that carrier charges must be paid in money."

It must further be remembered that this same *L. & N. R. Co.* v. *Central Iron & Coal Company* is cited in plaintiff's brief to the effect that the tariff need not provide when or by whom the payment should be made, and that these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. If the *L. & N. R. Co.* v. *Central Iron & Coal Company* is correct on this point, then and in that event we say that the written order on which the Railroad Company delivered the cabbage is binding on the Railroad and that it permitted the delivery of the freight solely and only after payment of the freight charges.

Our contention on this point is that this order is the same provision placed in the bill of lading and mentioned on pages 8 and 9 of plaintiff's brief, which prohibits the carrier from making delivery of shipment without payment of freight and other lawful charges.

We further say that the freight bill offered in evidence, despite all that has been said about Section 7 and other conditions, has printed as some of its conditions on the back thereof and after the numeral 7, the words:

> "Section 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but excepting those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid."

The plain English of this means that the bill of lading, without having to be signed in two different places, and which defendant in his answer called a "trick" bill of lading, requires the owner or consignee shall pay the freight and other lawful charges accruing on the property.

The defendant was neither the owner nor the consignee.

The bill of lading further declared that the carrier should not deliver possession at destination of the property covered by the bill of lading until all tariff rates and charges thereon have been paid except in those instances where it was lawfully authorized to do so. These provisions mean only one thing, and that is that the order of Sackenreuther, the owner, and the consignee, authorized the delivery of the freight to the Tom Ayoob Company.

The other part of Section 7 simply means that the consignor, unless he signed on the face of the bill of lading under the wording that the "carrier shall not make delivery of this shipment without payment of freight and all other lawful charges," that if the Railroad Company was unable to collect from the consignee, then and in that event the consignor would be responsible to the Railroad Company.

We do not dispute that the shipper of goods is primarily responsible for freight charges, but we contend that the word "primarily" shows that there are others responsible for the freight charges and that when the Railroad Company either collects or seeks to collect by taking bad checks or other things of no value from the consignee or owner, that they do so at the risk of being held guilty like other people for their neglect, laches and wrongdoing.

The contention in Plaintiff's brief that an interstate carrier cannot estop itself from enforcing payment from one who has assumed liability for transportation charges, becomes ridiculous when we consider that the bill of lading shows that the shipment was not prepaid, but that collection was to be made on delivery.

The regulations of the Interstate Commerce Commission on payment of rates and charges, 171 I. C. C. 268, makes the situation very clear when it says:

> "The carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges

within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, for a period of 48 hours computed as hereinafter set forth."

The wording of the above plainly means that the Railroad should have taken necessary "precaution" to assure payment of freight charges even if the order to deliver the goods to Tom Ayoob Company did not require payment of freight charges as a prerequisite to delivery of the cabbage.

The above rule further made Tom Ayoob Company the shipper insofar as collection of freight charges are concerned. The rule says:

"* * * those who undertake to pay such charges, such persons herein being called shippers * * *"

III.

Do cases cited by the Court of Appeal of Louisiana fail to support its decision.

The plaintiff, in its brief, set up that the Central Iron & Coal Company case does not support the State decisions because there was no clause by which the shipper agrees expressly to pay the freight charges or to guarantee their payment.

This statement does not track with the plaintiff's quotation from that case on page seven of their brief under the heading, "The Consignor is primarily liable for the freight charges".

We understand the Central Iron & Coal Company case to be a ruling of this Court that ordinarily, "the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is

ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee, for the shipper is presumably the consignor; the transportation ordered by him is presumably in his own behalf and on promise by him to pay therefor is inferred."

The facts of this case present an entirely different situation. In the instant case the defendant was not the owner and should not have been named as consignor in the bill of lading as he was acting for the consignee and all to the knowledge of the Railroad Company receiving the shipment. Further than this, the plaintiff in this case delivered the freight not to the consignee or owner, but to a third party on a written order of the consignee, who, while not primarily responsible for the freight, was required to pay the freight because the shipment was not prepaid. The delivery of the freight on the payment of the freight charges by this third party by checks certainly relieved the defendant of any liability in the premises; but even if the defendant was not relieved by the plaintiff accepting checks of the third party, this defendant was relieved by the laches and negligence of the plaintiff in not giving timely notice of the non-payment of the checks taken in payment of the freight.

In other words, even if this defendant had been the owner and the consignor, and which facts are denied, the defendant under the ruling of this Court in the Fullerton case, is absolved of all liability in the premises.

This Court said in *Fullerton Lumber Company* v. *Chicago, M. St. P. & P. R. R. Co.*, that

> "Carrier accepting check for freight charges held not relieved from loss, resulting from delay in presenting check, by general requirement that carrier's charges must be paid in money."

Now, as to whether the facts of this case disclose or involve an action or controversy properly within the jurisdiction of this Court, we beg to submit this quotation from *Southwestern Bell Telephone Company* v. *State of Oklahoma, et al.,* 303 U. S. 206, in which this Court says:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

The numerous citations of law in the *Telephone Company* case need not be here repeated.

In the case now before the Court on this application for Writs of Certiorari, it does not appear affirmatively from the record that a Federal question was presented for decision to the highest court of the State having jurisdiction, nor does it appear from the record that the decisions of the courts of Louisiana of a Federal question was necessary to the determination of the cause, or that the judgment of the courts of the State of Louisiana could not have been given without deciding a Federal question.

It is respectfully submitted that the Writ of Certiorari prayed for should not be issued.

PIERRE MISTROT,
By WADE O. MARTIN, JR.,
L. AUSTIN FONTENOT.